DOCUMENT RESUME

ED 254 133 HE 018 029

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TITLE Part-Time Faculty: Legal and Collective Bargaining Issues.
INSTITUTION American Association for Higher Education, Washington, D.C.
PUB DATE Oct 84
NOTE 6p.
PUB TYPE Viewpoints (120) -- Journal Articles (080)
JOURNAL CIT AAHE Bulletin; p8-12 Oct 1984

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Collective Bargaining; *College Faculty; Contracts; Due Process; *Employment Practices; Equal Protection; Faculty College Relationship; Higher Education; *Legal Responsibility; *Part Time Faculty; *Personnel Policy; Policy Formation; Teacher Salaries; Tenure; Unions

ABSTRACT

Employment rights of part-time faculty and legal and collective bargaining issues are discussed, with attention to tenure rights and job security, due process, and equal treatment. The part-time faculty contract may provide some employment continuity by incorporating seniority provisions, access to fractional tenure, and other protective clauses. Even if contractual and statutory rights are not explicit, part-timers may come to rely on certain patterns and practices that could be held to establish job security rights. Court decisions suggest it is best to have an explicit understanding of the terms on which individual faculty are employed, with mutual agreement on what due process is required. Equal protection challenges to inequities in part-time faculty compensation have been rare and thus far unsuccessful, since the job responsibilities of part- and full-time faculty differ. Part-time faculty are now included in varying proportions in some of the major collective bargaining units across the country. In addition to the separate unit, the following kinds of practices are covered: inclusive/benign, inclusive/protective, exclusive/benign, and exclusive/protective. Key principles that should be addressed in making policy for part-time faculty employment are identified. (SW)

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PART-TIME FACULTY:
Legal and Collective Bargaining Issues

by David W. Leslie

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Colleges and universities employ large numbers of faculty in part-time, temporary, and/or non-tenure track positions.[1] But policies covering their employment rights lag well behind that reality. By and large, part-time faculty continue to work in a system that is only beginning to recognize and provide for their basic interests.

Tenure Rights and Job Security

Part-time faculty are normally employed on short-term, renewable contracts, but their rights to employment security and continuity are severely limited. The contract may provide for some employment continuity or security by incorporating seniority provisions, access to fractional tenure, and other protective clauses. At Portland State University in Oregon, for example, the agreement with a part-time faculty collective bargaining unit provides that:

When feasible, appointments will be made for an academic year rather than for an academic term. When appointments are made for a term, the Department will furnish upon request an estimate of the prospects for continuing employment during the remainder of the year. The information thus furnished shall be regarded only as a good faith estimate and shall not constitute an offer of employment.[2]

Hedged as it may be, this contract creates an obligation on the part of the university to work toward full-year employment for part-timers.

California education law provides for increasing employment security for part-time faculty in direct relation to a) level of work load, b) continuity of employment, and c) duration of employment.[3] Under certain conditions, faculty in California's community colleges have acquired fractional tenure as a statutory property right.[4]

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Common practice at a college or university may result in *de facto* acquisition of rights to employment continuity and/or security. The California Supreme Court ruled in 1974 that certain routine practices of the Peralta Junior College District created "an expectancy of reemployment."[5] Particularly startling in this case was the fact that routine notices of *dismissal* were held to have created a legally enforceable expectancy of reemployment. Because the college had issued such notices to all part-timers, and because reemployment was the norm following issuance of such dismissal notices, the college was held to have led those receiving the form notices to anticipate reemployment. In an action also based on the common practice of a California community college, a part-timer at North Orange Community College was granted a trial to hear his case because his name was published with a specific course assignment in a college schedule.[6]

It is clear that part-time faculty may establish rights to continuity and job security. Even if contractual and statutory rights are not explicit, part-time faculty may have come to rely on certain patterns and practices. It is possible that these informal patterns could be held to establish job security rights.

Due Process

No employee may be dismissed during the term of his/her contract but for cause.[7] There is no distinction between part- and full-time faculty. Should a part-timer be dismissed for cause, he/she is entitled to the same procedure as a tenured professor.

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Financial exigency or fluctuations in enrollment or budget may be identified as a "cause" for which part-time faculty may be discontinued or not reemployed.[8] Part-time faculty contracts are not automatically contingent upon course enrollments however; this is a "cause" that must be specified. Just as importantly, priorities for employment termination need to be established. In *Ferner v. Harris*, equity was held to require that part-time tenured faculty stand in the same seniority queue with full-time tenured faculty.[9] At this particular institution, some part-timers were protected against retrenchment before non-tenured full-time faculty.

Notice of non-reappointment is not always required where a contract is for an explicitly limited term and where all rights to reappointment are waived or disclaimed. Contracts can be made contingent upon enrollment, finances, or other factors. But some notice must be provided to part-time employees, particularly those who have established continuous employment beyond some minimum period. The *Balen* decision suggests that form notices of non-renewal may be so imprecise as to constitute no practical notice to individual faculty of their particular situation.[10]

The lack of specificity in agreements about the term of employment and any required notice of non-reappointment may work to the disadvantage of either side. In *Warner*, the faculty member received no notice of non-reappointment and was able to establish a potential obligation on the part of the institution to reappoint.[11] In *Coffey*, it was established that a part-timer could have claimed the right to continued employment *and* to part-time tenure.[12]

Court decisions suggest it is best to have an explicit understanding of the terms on which individual faculty are employed, with mutual agreement on what due process is required. Contingency contracts that condition employment on course enrollment, budget, and similar factors are permitted, although the more specific they can be on criteria and notice for cancellation of courses, the more closely they will fit a sound due process model.

Equal Treatment

Should there be a pay scale for part-timers, or should all be paid a flat rate per course? Are individual negotiations over salary and compensation permitted? Neither equal protection law, nor equal employment opportunity law, restrict colleges' discretion. In fact, part-timers are treated under separate and unequal standards for purposes of the Equal Pay Act.[13] Equal protection challenges to inequities in part-time faculty compensation have been rare and thus far unsuccessful. In *McLachlan*, for example, Tacoma Community College was able to establish a satisfactory rationale for paying part-timers below the scale it applied to full-time faculty.[14]

But individually negotiated pay may have no relationship to the work being performed, or to the qualifications of individuals. Having no job-related basis for individual compensation means that every individual pay difference needs to be rationalized and justified when assertions of arbitrary or discriminatory treatment are raised. The less orderly the pattern, the more arbitrary and capricious pay differences will look.

Part-time compensation need not be pro-rated or scaled against full-time compensation. Part-timers generally do not carry the full range of academic responsibilities; their function is normally to teach, not to do research, advise students, participate in governance, or carry the range of responsibilities normally assigned to full-time faculty. Because the job differs, the pay may also differ.[15]

The new "comparable worth" standard may change methods of determining part-time compensation.[16] Going a significant step beyond "equal pay for equal work," this newer standard requires equal pay for work of equal worth. If applied to part-timers, the comparable worth doctrine could require strict pro-rating of pay on the theory that a course taught is equally valuable whether taught by a part-timer or a full-timer.

Financial exigency or fluctuations in enrollment or budget may be identified as a "cause" for which part-time faculty may be discontinued or not reemployed.

Many institutions (and some state legislation) classify part-time employees on several criteria; fraction of FTE load, accumulated length of service, and continuity of service are the most common. Somewhere above .50 FTE, part-timers achieve access to employment benefits normally reserved to full-time faculty. Likewise, longevity and/or continuity of service may establish certain security rights such as seniority or tenure accrual. These are generally benign and acceptable classifications if administered objectively and consistently.

Litigation in California raises a caution, though. In several cases, colleges have taken steps to break employment continuity or to reduce the FTE-level of employment

as a way to stop part-timers' progress on statutorily established security ladders.[17] Among the principles established in this litigation is that faculty cannot be required to waive benefits provided in law.[18] Once classifications and security ladders are established, they must be administered in good faith.

Court decisions suggest it is best to have an explicit understanding of the terms on which individual faculty are employed, with mutual agreement on what due process is required.

Collective Bargaining

Part-time faculty rights have been an issue since academic collective bargaining began in the early 1970's. Inclusion or exclusion in establishing a faculty bargaining unit is a perennial question.[19] Although the National Labor Relations Board presumes that part-timers have interests that are different from those of full-timers, and so would ordinarily vote to exclude part-timers from bargaining units of full-time faculty,[20] part-time faculty are now included in varying proportions in some of the major bargaining units across the country.

The range of practice is so broad that it can best be covered by reference to a few key types: inclusive/benign or inclusive/protective; exclusive/benign or exclusive/protective; and separate units.

• **Inclusive/benign**: Part-time faculty are partially included in this type of unit; their rights are acknowledged in the terms of the contract.

The inclusive/benign type is represented by the 1980-82 Illinois Valley Community College contract with its American Federation of Teachers unit. The union is recognized as the bargaining agent for "all teaching personnel under contract."[21] Although the contract reserves certain substantive rights to full-time faculty (e.g., sabbatical leaves and access to tenure), the terms are otherwise not restrictive to part-time faculty. Part-timers' pay is set at a flat rate ($300 per equated semester hour) equivalent to full-timers' overload pay, and they are not excluded from various insurance programs provided by the college. Although part-timers may not receive the same advantages and benefits of employment afforded full-timers under this contract, they are not overly hurt by it, either.

• **Inclusive/protective**: Although some part-time faculty may be included in the bargaining unit, the contract is written to protect the interests of full-time faculty and to discourage excessive use of part-time faculty.

Inclusive/protective contracts are a fairly common form. A 1979 report indicated that 38% of contracts include part-time faculty in the bargaining unit.[22]

Among the major contracts now in force, the one covering the California State University system may be closest to the benign/protective borderline. In terms of part-time faculty, appointments in that system can be made conditional upon enrollment and budget considerations. Part-timers do not have access to tenure-accruing probationary appointments. This contract also contains a retrenchment clause that preserves the rights of full-time faculty: part-timers are the first to be laid off, and the last to be re-hired.[23] The California State contract is otherwise benign.

If applied to part-timers, the comparable worth doctrine could require strict pro-rating of pay on the theory that a course taught is equally valuable whether taught by a part-timer or a full-timer.

In the South Dakota Board of Regents contract, part-timers are included in the bargaining unit only if they carry a half-time or greater work load; otherwise, they are excluded.[24] Part-time faculty do not accrue tenure rights, and their contracts are limited to one year in duration. South Dakota provides that part-timers will be first released and last reappointed in retrenchment actions. Part-time unit members accrue pro-rated sick leave and pro-rated salary increases, and they are not barred from the various insurance coverages offered.

Inclusive/protective contracts do not put part-time unit members at a serious disadvantage, but there are distinctions drawn between their rights and the rights of full-timers—particularly in the tenure and retrenchment clauses.

• **Exclusive/benign**: Part-time faculty are excluded from the bargaining unit, but are not directly affected by the terms of the contract.

The exclusive/benign type is represented by Belleville Area College's agreement with its American Association of University Professors chapter. This contract contains a unit recognition clause covering only full-time faculty. But section 1.2 provides benefits for some part-timers:

Those part-time faculty members between 3/5 and 5/5 are eligible for (1) pro-rated sick leave, (2) full hospitalization and disability, (3) placement on

the salary schedule on a pro-rated basis. No other benefits will prevail.[25]

In other respects, the Belleville contract appears to be neutral in its impact on part-timers.

• **Exclusive/protective**: Part-timers are excluded from the unit, and their rights are adversely affected by the terms of the contract.

Exclusive/protective contracts provide strong protections for full-time faculty interests and security. The College of Lake County agreement with its American Federation of Teachers unit covers full-time faculty only. The members of the unit are given preference over part-timers in the assignment of overloads and in access to summer teaching. Where a reduction in force is initiated, "faculty members shall not be released if part-time and/or overload assignments are being maintained which would constitute a full-time load for which the released faculty member is fully qualified to teach and which can be reasonably scheduled."[26]

• **Separate unit**: Part-time faculty may form their own bargaining unit.

Separate bargaining units for part-time faculty are exemplified by the agreement at Portland State University in Oregon. This contract does not differ markedly from the terms of an "inclusive/benign" agreement. It is highly procedural in focus, providing few direct rights or benefits for the part-time faculty it covers. The agreement specifies that appointments are for fixed terms and that tenure rights do not accrue to unit members. But provisions are also made for surveys of part-timers' interest in re-employment, for offers of employment to be made in writing at least five weeks in advance of the first class meeting, and for good-faith efforts to make part-time appointments on a full-year basis. Limits to continuity and/or duration of part-timers' employment are banned. Salaries are established in explicit schedules, or are pegged to at least the minimum of full-time faculty salaries where part-timers are appointed with regular faculty rank.

The separate unit contract does not address all employment issues. It does, however, address the most distracting procedural issues that have long been sources of frustration for part-time faculty.

Conclusion

A flaw in many policy models for part-time faculty employment is their preoccupation with consistency. Institutions differ dramatically in the ways they use part-timers. Part-timers differ among themselves. The term "part time" encompasses continuing and temporary employees, core and peripheral faculty. These people are employed at both small and substantial FTE levels. A model of consistent treatment is illogical as a goal when the range of institutions and people involved are so varied.

In general, the law can accommodate inconsistency in substance if that inconsistency is rationally based, not discriminatory, and is specified in the conditions of employment. But courts and labor boards have moved in where colleges and universities have ill-defined policies that do not meet these criteria.

A few key principles should be addressed in making policy:

Policies should reflect reality: if large numbers of part-timers are going to be employed semester after semester . . . it is probably unrealistic to build a policy that treats them as casual and short-term employees.

1. Policy should reflect the way a college or university actually utilizes part-time faculty.

At some institutions, part-timers are used for emergency or peripheral purposes only. At others, part-timers carry a significant share of the mainstream instructional load. In some places, individual departments have different philosophies about using part-timers. Policies should reflect reality: if large numbers of part-timers are going to be employed semester after semester—many of whom will achieve long-term continuity—it is probably unrealistic to build a policy that treats them as casual and short-term employees.

2. Part-time faculty should be employed to the educational advantage of students, not to the economic advantage of the institution or its full-time faculty.

Excessive use of part-timers creates hidden costs by diverting full-time faculty effort to indirect instructional duties. Using part-time faculty to cover large portions of direct instruction may push certain costs down, but one is not automatically saving on other budgeted functions, nor may one be saving at the bottom line or maximizing quality.

In several cases, colleges have taken steps to break employment continuity or to reduce the FTE-level of employment as a way to stop part-timers' progress on statutorily established security ladders.

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Not all part-time faculty want or need the same kinds of remuneration and support. Policies can accommodate these different interests and . . . can remain within the law.

3. Differences among part-timers can be accommodated.

Not all part-time faculty want or need the same kinds of remuneration and support. Policies can accommodate these different interests and, if objective and consistent, can remain within the law.

4. Agreements with part-timers should be explicit.

Casual agreements can lead to misunderstanding, discrimination, unexpected liabilities, and litigation.

5. Part-timers and their supervisors should be informed.

"Information" is more than a course syllabus, an oral agreement with a chairperson, and a brief letter of welcome. By providing a carefully designed flow of formal and informal information to (and about) part-time faculty, a college can exert some control over how they are treated and how they perform. Helping them to know their colleagues, and how their work fits a department's goal, will provide them with some direction. Giving them role models, guidance on teaching methods, and constructive feedback will bring their teaching performance closer to departmental norms. Sharing policy statements and providing for participation—even if only at the level of observation—in decision-making can provide context and insight within which part-timers can frame their work. Establishing human links in the form of mentors will enhance a sense of involvement and commitment. In short, open channels of communication with part-timers should help them to be more productive colleagues and keep misunderstandings at a minimum.

The burden falls on the college or university to bring clarity to its policies and practices. Those policies should be flexible enough to accommodate a range of legitimate interests and specific enough to leave as little doubt as possible about the terms and conditions of employment.

If any of these imperatives seem inconsistent, they merely reflect the challenge of employing part-time faculty, who themselves are an inconsistent population whose jobs represent a wide range of assignments.

This paper originally presented as part of a panel, "Employing Part-time Faculty as Resources for Academic Quality," at the National Conference on Higher Education (AAHE), March 15, 1984, Chicago, Illinois.

Notes

[1] Data available in 1978 led to a conclusion that over 200,000 part-timers—about one-third of all faculty—were employed in American colleges and universities. D. Leslie, S. Kellams, and M. Gunne. *Part Time Faculty in American Higher Education.* New York: Praeger, 1982.

[2] Agreement between Portland State University and Local 3571, American Federation of Teachers. (1981)

[3] California Education Code §§87480-87485.

[4] See Coffey v. San Francisco Community College District, 135 Cal. Rptr. 881 (1977). Note that statutory changes in recent years have made it more difficult to establish a statutory property right to employment.

[5] Balen v. Peralta Junior College District, 114 Cal. Rptr. 589 (1974). Compare with Bruno v. Detroit Institute of Technology, 215 N.W.2d 745 (1974).

[6] Warner v. North Orange County Community College District, 161 Cal. Rptr. 1 (1979).

[7] Chung v. Park, 514 F. 2d 382 (1975).

[8] See, for example, Agreement between the Board of Trustees of the California State University and the California Faculty Association, Unit 3—Faculty. Article 12, §12.5 (1983).

[9] 119 Cal. Rptr. 385 (1975).

[10] Balen v. Peralta Junior College District, *op. cit.*

[11] Warner v. North Orange County Community College District, *op. cit.*

[12] Coffey v. San Francisco Community College District, *op. cit.*

[13] 29 U.S.C. §206.

[14] McLachlan v. Tacoma Community College District No. 22, 541 P.2d 1010 (1975).

[15] See California Teachers Association v. San Diego Community College District, 170 Cal. Rptr. 817 (1981), for indicators of different job content.

[16] C. Farrell. 'Comparable worth' ruling by U.S. court prompts widespread interest on campuses. *The Chronicle of Higher Education.* January 11, 1984, pp. 21-22.

[17] Compare Kalina v. San Mateo Community College District, 183 Cal. Rptr. 12 (1982), with Balen v. Peralta Community College District, *op. cit.*

[18] Covino v. Contra Costa Community College District, 142 Cal. Rptr. 812 (1977).

[19] This question has been considered extensively elsewhere, and will not be treated in substantive detail here. See R. Head and D. Leslie. Bargaining unit status of part-time faculty. *Journal of Law and Education.* 8 (July, 1979): 361-378.

[20] New York University, 205 N.L.R.B. No. 16 (1973).

[21] Two-Year Agreement between Board of Trustees, Community College District No. 513, and American Federation of Teachers, Local 1810; 1980-81, 1981-82; p. 1.

[22] D. Leslie and D. Ikenberry. Collective bargaining and part-time faculty: Contract content. *The Journal of the College and University Personnel Association.* 30 (Fall, 1979): 18-26.

[23] Agreement between South Dakota Board of Regents and Council of Higher Education, an Affiliate of the South Dakota Education Association and the National Education Association (effective through June, 1984).

[24] A Memorandum of Understanding between the Board of Trustees and Faculty of Belleville Area College, District No. 522—1980-1983; p. 4.

[25] 1980-82 Agreement between Board of Trustees of Community College District No. 532, County of Lake and State of Illinois, and College of Lake County Federation of Teachers, Local No. 2394, American Federation of Teachers; p. 69.